

No. 16,349

IN THE

United States Court of Appeals  
For the Ninth Circuit

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MARY C. HUDSON, as Administratrix of  
the Estate of Herbert A. Hudson,  
Deceased,

*Appellant,*

VS.

TRANSOCEAN AIR LINES, a Corporation,  
and SLICK AIRWAYS, INC., a Corpo-  
ration,

*Appellees.*

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APPELLANT'S REPLY BRIEF.

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## Subject Index

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	Page
Preliminary statement .....	1
Discussion of points raised by appellee in its brief .....	3
1. The laws regulating airline accidents over land, whether domestic or foreign, and the application of compensation acts to such accidents in decisions cited by appellee are immaterial to the issues in this case .....	3
2. The Twilight Zone cases by their very nature disprove appellee's position .....	4
3. Appellee has mistaken the true test of admiralty jurisdiction and is clearly wrong in stating that maritime employment is the controlling factor .....	6
4. Section 767 of Title 46, U.S.C.A. does not bar recovery in this action .....	11
5. Appellee's defense of lack of "derivative liability" has no basis in law or logic .....	13
6. The defense of election of remedies is no more valid than it was prior to the decision in the Hahn case .....	14
Conclusion .....	16

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## Table of Authorities Cited

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Cases	Pages
Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 58 L. Ed. 1208, 34 S. Ct. 733 (1913) .....	10
D'Aleman v. Pan-American, 259 Fed. 2d 493 .....	4
Decker v. Moore-McCormack Lines, 91 Fed. Supp. 560 .....	13
Feres v. United States, 340 U.S. 135, 95 L.Ed. 152 .....	3

	Pages
Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 66 L. Ed. 321 (1921) .....	10
Hahn v. Ross Island Sand & Gravel Co., 3 L. Ed. 292 .....	15
Johansen v. United States, 343 U.S. 427, 96 L.Ed. 1051 ....	3
Kermarec v. Transatlantique, 3 L. Ed. 2d 550 .....	11
King v. Pan-American, 166 Fed. Supp. 136 .....	4, 10, 12
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 64 L. Ed. 834, 40 S. Ct. 438 .....	12
Mahnich v. Southern S. S. Co., 321 U.S. 96, 88 L. Ed. 561	14
Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 Fed. 2d 968 (4th Cir. 1951) .....	15
Polland v. Seas Shipping Co., 146 Fed. 2d 875 .....	13
Pope & Talbot v. Hawn, 346 U.S. 406, 98 L. Ed. 143 .....	14
Pure Oil Co. v. Geotechnical Corp., 94 Fed. Supp. 866, affirmed 196 Fed. 2d 199 .....	13
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099	14
The Black Gull, 82 Fed. 2d 758 .....	13
The Four Sisters, 75 Fed. Supp. 399 .....	13
The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. Ed. 125 .....	6, 10, 11
Washington v. W. C. Dawson & Co., 264 U.S. 219, 68 L. Ed. 646, 44 S. Ct. 302 .....	12
Western Boat Building Co. v. O'Leary, 198 Fed. 2d 409 ....	15
Wilson v. Transocean Airlines, 121 F. Supp. 85 .....	9, 12

### Statutes

High Seas Act, Section 7 .....	2
Jones Act (46 U.S.C.A.):	
Section 688 .....	13
Section 761 .....	11, 13
Section 766 .....	13
Section 767 .....	11

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**APPELLANT'S REPLY BRIEF.**

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**PRELIMINARY STATEMENT.**

The brief for appellee discusses some five or six different theories of law, each of which it is claimed establishes that the California compensation remedy must be applied. As we read the brief these theories or points are as follows:

1. Because airline employees injured or killed while flying from one state to another, or in a foreign country, may be subject to compensation laws, the High Seas Act should not be applied to accidents over or on the high seas if state compensation is available.

2. The "twilight zone" cases relating to ship-shore accidents have established a precedent or principle which applies to the facts of this case.

3. The true test of exclusive admiralty jurisdiction is the "maritime" nature of the accident, and although somehow passengers may recover when injured in a high seas flight, employees may not because they are not "maritime workers".

4. Section 7 of the High Seas Act bars employees from recovery if covered by a state compensation law, although passengers are not barred, regardless of state death acts.

5. The language of the High Seas Act concerning "... who would have been liable if death had not ensued ..." bars recovery by an airline employee because of the "fellow servant" defense, preventing a seaman from recovering for negligence, and the airline employee, not being a seaman, cannot sue under the Jones Act.

6. This action is barred by the doctrine of election of remedies because, older decisions to the contrary, the Supreme Court has changed the rule in a recent decision.

May we briefly set forth our views regarding these assertions and point out the misconceptions which to us seem so apparent.

**DISCUSSION OF POINTS RAISED BY  
APPELLEE IN ITS BRIEF.**

1. THE LAWS REGULATING AIRLINE ACCIDENTS OVER LAND, WHETHER DOMESTIC OR FOREIGN, AND THE APPLICATION OF COMPENSATION ACTS TO SUCH ACCIDENTS IN DECISIONS CITED BY APPELLEE ARE IMMATERIAL TO THE ISSUES IN THIS CASE.

Appellee has cited a number of cases concerned with airline accidents *not on the high seas*, wherein it has been held that the compensation law of the state of employment bars suit against the employer, even though the accident occurred out of the state. We fail to see what bearing these decisions have on the issues in this case. Here the question is whether a state act may be invoked to prevent the application of an apparently all-inclusive Federal remedy. Here we have a specific act of Congress regulating liability in a field left exclusively to the Federal Government by the Constitution itself.

We believe that this theory of defense simply injects a complicated question of conflict of laws and public policy, which can in no way logically affect the totally different question here involved.

In connection with this same theory appellee refers to the Supreme Court decisions in *Feres v. United States*, 340 U.S. 135, 95 L.Ed. 152, and *Johansen v. United States*, 343 U.S. 427, 96 L.Ed. 1051. These cases were concerned with the rights of Federal employees injured during employment with respect to the Tort Claims Act, as opposed to the Federal Employees' Compensation Act and certain servicemen's benefit acts. Accordingly, the Court merely decided

issues relating to possible conflict between two Federal acts in a field admittedly reserved to Federal jurisdiction. What application can such rulings have to the jurisdictional question in our case?

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## 2. THE TWILIGHT ZONE CASES BY THEIR VERY NATURE DISPROVE APPELLEE'S POSITION.

We do not believe that there can be found in any reported American decision any holding that the sinking of a ship on the high seas is other than an admiralty matter. We discussed in our opening brief several "ship-shore" or "Twilight Zone" cases because in the only decision bearing upon the same issue involved in our case the District Court had cited these cases as a basis for its ruling. (*King v. Pan-American*, 166 Fed. Supp. 136.) We think these longshore and harbor worker cases simply prove that the Federal Government has surrendered jurisdiction in admiralty matters in only a very narrow and limited field and that in no case has that surrender been extended to activity on the high seas. The very absence of any decisions concerned with jurisdiction as between state and Federal laws in accidents on the high seas certainly is the best proof that Federal jurisdiction in such locality is beyond dispute. If we assume that it is now settled law that the Death on the High Seas Act does apply to airplane crashes and that, as the Court says in *D'Aleman v. Pan-American*, 259 Fed. (2d) 493,

“To give to passengers on ships protection of the Act and deny similar rights to passengers in the air would amount to unjustifiable and highly technical discrimination”,

what logical reason can be given to include the crew of a vessel under admiralty and at the same time exclude the crew of an airplane?

It is this hurdle which the appellee seeks to clear by constructing a false connection between “twilight zone” cases and this case. But the distinctions are so obvious that such reasoning must fail. None of these “ship-shore” cases is concerned with a member of the crew of a vessel. In each decision the lack of connection with navigation or commerce was an essential factor in the holding of state jurisdiction. In each instance the Court points up the factor of “local concern”.

A still more fundamental difference lies in the obvious reason why such class of cases have been a most perplexing source of litigation. All of the cases have been concerned with accidents occurring in state or territorial waters and very close to shore, none of them with a vessel moving on the high seas.

We conclude that while the study of “ship-shore” and “twilight zone” litigation is complex and at times uncertain, that it at least does clearly prove the very limited boundaries in which there is any question about Federal jurisdiction.

3. APPELLEE HAS MISTAKEN THE TRUE TEST OF ADMIRALTY JURISDICTION AND IS CLEARLY WRONG IN STATING THAT MARITIME EMPLOYMENT IS THE CONTROLLING FACTOR.

A review of admiralty history in the United States by way of reading the decisions of the Supreme Court will at once disclose that *locality* is the true test of admiralty jurisdiction. We concede that in some of the "twilight zone" cases the Court has also placed some weight upon maritime duties, but this has become a factor in only those borderline instances where the question involved was as to "local concern", and navigation or commerce were not a part of the activities.

Perhaps the most cited decision in admiralty history has been an 1865 decision of the Supreme Court which concerned a suit for damages resulting from a fire aboard a ship moored at a dock, which fire spread to the adjacent dock and warehouse. In this decision, *The Plymouth (Hough v. Western Transp. Co.)* 3 Wall. 20, 18 L. Ed. 125, the Court stated:

"It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high water mark.

"In the case of *Thomas v. Lane*, 2 Sumn., 9, Mr. Justice Story, in a case where the imprisonment was stated in the libel to be on shore, observed: 'In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the Act. The ad-

miralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within ebb and flow of the tide.' Since the case of *The Genesee Chief*, 12 How., 443, navigable waters may be substituted for tide-waters. This view of the jurisdiction over maritime torts has not been denied.

"But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possesses jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of material-men, for supplies, charter-parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea, or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have, at most, but a very remote resemblance. *Thomas v. Lane*, 2 Sumn., 2; *The Huntress*, Davies, 85; *U. S. v. Magill*, 1 Wash. C. C. 463; *Genesee Chief*, 12 How., 443; *Hollingsworth v. Fry*, 4 Call. 345; 1 Kent, Com. 367, and *note*; *Plummer & Webb*, 4 Mason, 383.

"They are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising un-

lawful authority over him. The substance and consummation of the wrong were on board the vessel—on the high seas, or navigable waters—and the injury complete within admiralty cognizance. It was the tortious acts on board the vessel to which the jurisdiction attached.

“This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely: that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damage, in technical language, whatever else attended it, must have been there complete.

“Much stress has been given to the fact, by the learned counsel who would support the jurisdiction, in his argument, that the vessel which communicated the fire to the wharf and buildings, was a maritime instrument, or agent, and, hence, characterized the nature of the tort. In other words, that this characterized it as a maritime tort and, of course, of admiralty cognizance.

“But this, we think, a misapprehension. The owner of a vessel is liable for injuries done to third persons or property by the negligence or malfeasance of the master and crew while in the discharge of their duties and acting within the scope of their authority. It is upon this principle that the defendants are liable, if at all, to the libelants for the damages sustained. The circumstance that the agents were in the employment of the owners on board the vessel, and that the neg-

ligence occurred while so employed, and which occasioned the damage, gives to the libelants the right of action. But if they had been employed upon any other structure in the river—on a raft, or floating platform, for work on the river, and the fire had been communicated to the wharf and buildings on account of their negligence while so engaged, the right of action would have been the same. The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.

“A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. The fact, therefore, of its having taken place on board the propeller *Falcon*, in the present case, is not an element that imparts any peculiar character to the nature of the tort complained of. This is so in cases of collision, in which the offending vessel may be attached and proceeded against as one of the remedies for wrong done. The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.”

The holding above, although frequently questioned, has remained the law. In *Wilson v. Transocean Air-*

lines, 121 F. Supp. 85, Judge Goodman cites "*The Plymouth*" as authority for his statement that:

"Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred."

Later decisions of the Supreme Court concerned with "ship-shore" accidents have indeed placed some weight upon maritime activity where the locality was borderline but have retained the same fundamental test. Thus, in *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58 L. Ed. 1208, 34 S. Ct. 733 (1913), the Court approves the holding in "*The Plymouth*" and at the same time emphasizes the maritime nature of the duties of the injured stevedore.

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 66 L. Ed. 321 (1921), upon which appellee relies, the Court quotes from "*The Plymouth*" and approves the holding. Again the Court discusses the very limited field relating to "certain local matters" in which state laws may be applied if the duties of the injured party are not maritime in nature. We ask the Court to carefully consider the holding in the *Rohde* case. It is upon this authority and other almost identical cases that the Court in *King v. Pan-American*, 166 Fed. Supp. 136, and the appellee here place great reliance. Note that the injured Rohde was a workman engaged in construction of a vessel lying at the dock of a shipbuilding plant in the Willamette River. Can the facts of such a case bear any relation to the facts here present?

In 1959 the Supreme Court has again cited "*The Plymouth*" with approval. See *Kermarec v. Transatlantique*, 3 L. Ed. 2d, 550.

Thus, we see that, contrary to the argument of appellee, the application of admiralty law is dependent upon locality and not upon maritime employment. It seems to us to be fair to say that only in certain very limited and borderline cases has the law permitted the states to assume jurisdiction, and this only in the absence of maritime employment and also in the absence of any specific controlling Federal statute.

And finally, if any doubt exists that decedent in this case was not a "twilight zone" worker engaged in borderline employment of local concern, may we call the Court's attention to the plain words of the statute itself. Congress has certainly set aside any doubt as to the exact borders of the area in which the act shall be applied. This area is

"... on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States. . . ." (Sec. 761, 46 U.S.C.A.)

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#### 4. SECTION 767 OF TITLE 46, U.S.C.A. DOES NOT BAR RECOVERY IN THIS ACTION.

Appellee devotes considerable argument to the claim that the above section, although not applicable to passengers, preserves state compensation laws as the sole remedy for air line employees.

We see no purpose in any lengthy discussion of the history of this section. Judge Goodman's opinion in the *Wilson* case (supra) referred to by appellee fully outlines the circumstances of the puzzling language. It seems to us that the District Court's analysis of its effect and importance as to the passenger in the *Wilson* case and its effect as to the employee in the *King* case (supra) are hardly consistent. If the interpretation of the section as a bar to a passenger's suit would raise "grave constitutional questions", why would not such a constitutional problem arise if the section is held to bar the suit of an employee?

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 64 L. Ed. 834, 40 S. Ct. 438, and in *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 68 L. Ed. 646, 44 S. Ct. 302, the Supreme Court twice declared invalid acts of Congress purporting to place waterfront employees under state compensation laws. Each of these decisions holds that such action by Congress is unconstitutional because of the plain intent of Article 3, Section 2 of the Constitution reserving exclusive control of admiralty matters to the Federal Government. If the Court refuses state jurisdiction in waterfront cases is it likely that it would permit similar jurisdiction on the high seas?

May we also note that several Federal decisions have considered actions by the dependents of seamen arising out of high seas accidents and brought under this act, and that nowhere does it appear that the Courts, or for that matter, the defendants, have raised the slightest question as to a bar imposed by section

767. These decisions, of course, are few in number. The High Seas Act was passed at about the same time as the Jones Act (46 U.S.C.A. 688), and only on rare occasions have a seaman's survivors, for one reason or another, invoked the High Seas Act instead of the Jones Act. The point is, their right to do so has not been questioned and the Courts have entertained such suits. See: *The Black Gull*, 82 Fed. 2d 758; *Decker v. Moore-McCormack Lines*, 91 Fed. Supp. 560; *Polland v. Seas Shipping Co.*, 146 Fed. 2d 875; *Pure Oil Co. v. Geotechnical Corp.*, 94 Fed. Supp. 866, affirmed 196 Fed. 2d 199; *The Four Sisters*, 75 Fed. Supp. 399.

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##### 5. APPELLEE'S DEFENSE OF LACK OF "DERIVATIVE LIABILITY" HAS NO BASIS IN LAW OR LOGIC.

In connection with this point, may we first refer to the same Federal decisions just cited to the Court relating to actions by seamen's dependents under the Death Act. Again, we can find no opinion or claim that such a defense exists under the High Seas Act.

Note that the Congress has included in the chapter (Sec. 766) a specific comparative negligence rule, and that the language of Sec. 761 includes the word "default" as well as "wrongful act" and "neglect".

Appellee in one breath urges that decedent Hudson, having been a member of the crew of an airship, rather than a vessel, is not entitled to the benefits of the Jones Act because he is not a seaman, and in the next breath that he must be held to the common law

admiralty rule that bars a seaman from recovery for injury resulting from negligent acts of his fellow crew members (except the master). These contentions seem slightly inconsistent.

Even assuming the premise to be true that Hudson, under common admiralty law, would have had no right of recovery for injury resulting from a careless act of a fellow servant, still no defense to this libel can be established. We call the Court's attention to the libel of appellant (Tr. pp. 5-6) wherein it is claimed that the plane was "negligently maintained". It is elementary that negligence causing an unseaworthy condition or a defective appliance, even though it is obviously the negligence of another servant which permits the appliance to become defective, does not bar recovery in admiralty.

This rule is clearly outlined in the Supreme Court opinion found in *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 88 L. Ed. 561, and see also *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099, and *Pope & Talbot v. Hawk*, 346 U.S. 406, 98 L. Ed. 143, wherein it is held that the duty to supply safe equipment is non-delegable and absolute.

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6. THE DEFENSE OF ELECTION OF REMEDIES IS NO MORE VALID THAN IT WAS PRIOR TO THE DECISION IN THE HAHN CASE.

The final defense asserted by appellee relates to election of remedy. Appellee concedes that until a recent ruling of the Supreme Court the decisions in

*Western Boat Building Co. v. O'Leary*, 198 Fed. 2d 409, and in *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 Fed. 2d 968 (4th Cir. 1951) would have prevented the defense of election of remedies. But appellee now states that these decisions have been overturned by *Hahn v. Ross Island Sand & Gravel Co.*, 3 L. Ed. 292.

A reading of this very brief opinion reveals that appellee's contention is completely unfounded, and that actually the decision makes even more strong the position of appellant. Here is another "twilight zone" case and the question was whether the employee of a sand and gravel company working on a barge in navigable water could sue under state law or was bound by the Federal Compensation Act. The Court held he could sue, but, in so holding, stated:

"Of course, the employee could not do this if the case were not within the 'twilight zone', for then the Longshoremen's Act would provide the exclusive remedy. Since this case is in the 'twilight zone', it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery."

Here the Court is saying as clearly as it can be said that, except for "twilight zone" cases, admiralty matters are subjects solely and exclusively for Federal regulation. The California Commission had no power to grant an award because it had no jurisdiction, and appellant, under the authorities cited, may not be barred by her election of remedy.

**CONCLUSION.**

Appellant therefore again respectfully submits that the summary judgment in favor of appellee should be reversed with directions to the District Court to hear and determine the suit in admiralty.

Dated, Oakland, California,  
July 8, 1959.

JOHN KRAMER,  
SHERIDAN DOWNEY, JR.,  
*Proctors for Appellant.*